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IN THE

Supreme Court of the United States

October Term, 1964

No. 888

CRAWFORD TRANSPORT COMPANY, INCORPORATED,

Petitioner,

v.

CHRYSLER CORPORATION and CHRYSLER COMMERCIAL CARRIERS INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT CHRYSLER CORPORATION IN OPPOSITION

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent Chrysler Corporation hereby submits its brief in opposition to the Petition for Writ of Certiorari filed herein on February 8, 1965.

Questions Presented

1. Whether it is *per se* a restraint of the trade of transporting new automobiles by truck in violation of Section 1 of the Sherman Act for an automobile manufacturer in order to obtain a more efficient and economical distribution of its product, to sell its product nationally only on condition that, prior to the transfer of title to the purchaser, the manufacturer

alone selects the means by which and the common carrier by whom the new automobile is to be transported to the purchasing dealer, prepays the freight and collects from the purchaser a destination charge based on both the actual freight cost and the comparable charge made by the manufacturer's competitors to their dealers in the purchaser's area.

2. Whether the Court of Appeals erred in holding that the evidence supported the trial judge's findings that the respondents did not attempt to monopolize or combine or conspire to monopolize or to restrain the trade of transporting new automobiles in violation of Sections 1 or 2 of the Sherman Act.

Statement

Respondent, Chrysler Corporation (hereinafter sometimes called "Chrysler"), a manufacturer of motor vehicles, has for many years marketed its products to and through a system of Direct Dealers with each of whom Chrysler entered into a Direct Dealer Agreement. As early as February, 1952 the standard form of Direct Dealer Agreement not only gave Chrysler the sole power to determine the means and manner of delivering vehicles purchased by the dealer but also permitted Chrysler to prepay the freight and to bill the dealer for a transportation charge in addition to the sales price of the vehicle (R. 103a; 838a). However, prior to November, 1954, Chrysler sold its vehicles to its dealers F.O.B. point of manufacture or assembly and the dealers were billed by and paid to the carriers all freight costs (R. 31a). During this period, common carriers in

the business of transporting new motor vehicles competed with each other for the business of transporting Chrysler vehicles into the areas for which they were certificated by the Interstate Commerce Commission. They did so not only by soliciting the dealers who purchased the vehicles and paid the freight bills but also by actively soliciting Chrysler, the manufacturer and shipper of the vehicles (R. 735a).

In November, 1954, Chrysler changed the terms and conditions under which it sold its vehicles to its dealers by exercising its right under the Dealer Agreement to sell on a "freight prepaid" basis (R. 104a). Thereafter the carriers transporting Chrysler vehicles to the dealers billed the freight costs to and received payment from Chrysler. Chrysler, in turn, billed the cost of the freight to the dealer at the same time that it billed the price of the vehicle itself. Under this arrangement Chrysler exercised its contractual right to select the method of transporting the vehicles it sold to its dealers, to choose the carriers to be employed in such transportation and to pay to the carriers and collect from its dealers the freight costs involved (R. 105-106a). However, Chrysler followed a practice of honoring requests from its dealers, when not inconsistent with operational efficiency, as to the mode of transport and the particular carrier to be used (R. 104a).

In February, 1956, Chrysler ceased attempting to charge and collect from its dealers the actual freight cost involved in each shipment and instead began billing its dealers a "destination charge", that is, a charge made for delivering the vehicles to the deal-

ers (R. 816a). This charge would vary from area to area and between different model vehicles and the fixing of each charge depended upon considering not only Chrysler's freight costs but also the destination charges made by General Motors Corporation and Ford Motor Company for delivering comparable products into the same market area (R. 820-822a). With respect to the selecting of particular carriers Chrysler continued its practice of honoring dealers' requests when not inconsistent with operational efficiency.

In September, 1956, Chrysler organized and incorporated under Delaware law a wholly-owned sales subsidiary, Chrysler Motors Corporation (hereinafter sometimes called "Motors"). On or about November 1, 1956, Chrysler entered into an agreement with Motors under which Chrysler assigned to Motors all its direct sales agreements with dealers throughout the United States and agreed to sell to Motors and to deliver to Motors' dealers all vehicles Chrysler manufactured and assembled for domestic retail sale (R. 106-107a). Under this agreement Chrysler retained the right to prepay the freight on vehicles it sold to Motors and shipped to Motors' dealers. Chrysler also retained the right to select the means and the carrier to be used in transporting vehicles to Motors' dealers (R. 107a).

Motors has not, at any time, taken any part in shipping to its dealers the vehicles it sells to them (R. 107a).

Throughout a period beginning prior to 1952 and continuing through 1956 Petitioner (hereinafter some-

times called "Crawford") a common carrier by motor vehicle certificated by the Interstate Commerce Commission with rights to transport new automobiles from Detroit to portions of Kentucky, West Virginia and North Carolina solicited and was tended traffic by Chrysler for delivery to Chrysler dealers in the areas in which it had destination rights. In soliciting such business Crawford competed with approximately 9 other common carriers each of whose destination territory to some degree overlapped Crawford's (R. 136-137a). Chrysler tendered traffic to all of them (R. 463-472a).

During the year 1956 Chrysler's Director of Traffic submitted to his supervisors two studies and analyses of Chrysler's transportation practices and their effect on Chrysler's competitive position as an automobile manufacturer. Based on these studies the Group Executive, to whom the Director of Traffic reported, presented to Chrysler's Administrative Committee a proposal that in order to insure the timely and economical delivery of its products to dealers Chrysler reduce from 83 to 16 the number of common carriers to whom it tendered traffic from all its plants in the United States into all parts of the United States. This written proposal contained an analysis of the transportation problems created by Chrysler's current use of a large number of common carriers by motor vehicle varying greatly in size, efficiency and financial soundness and the competitive advantages enjoyed by General Motors Corporation and Ford Motor Company through their use of only 14 and 16 motor carriers, respectively. The proposal requested that the Central Traffic Department be authorized to select the motor carriers to be retained on the basis of past

performance, growth potential, financial stability, freedom from alliances with other automobile manufacturers and adequacy of certificate rights and detailed the advantages that would result from such a program (R. 521-532a). The Administrative Committee approved the proposal (R. 633a).

On May 17, 1957 Chrysler held a meeting in Detroit, Michigan, which was attended by representatives of all the common carriers then transporting Chrysler vehicles from Detroit and at which Chrysler announced that it intended to reduce the number of common carriers to which it tendered traffic. At this meeting Chrysler presented in detail the proposed changes in its traffic policy and the reasons therefor, and described the five criteria approved by Chrysler's Administrative Committee, upon which each carrier then serving Chrysler would be evaluated to determine whether it would be a "retained" or a "non-retained" carrier under the new program. Chrysler also announced that individual discussions in connection with this program would be held with representatives of each carrier at which time each carrier would be advised whether Chrysler would continue to tender traffic to it commencing with the shipment of the 1958 model automobiles in September of 1957 (R. 110-111a; 430-445a).

On or about June 20, 1957, Chrysler notified Crawford, that Chrysler would no longer tender traffic to it commencing with the shipment of 1958 model vehicles. From May 17, 1957 to July 17, 1957, approximately 50 other common carriers were similarly notified by Chrysler. On or about June 27, 1957, Chrysler notified respondent, Commercial Carriers,

Inc. (hereinafter sometimes called "Commercial"), that Chrysler would continue to tender traffic to it. Approximately 15 other common carriers were similarly notified by Chrysler (R. 111a).

At the meeting between representatives of Chrysler and Commercial at which Commercial was notified that it would continue to receive traffic from Chrysler, the Chrysler representatives indicated in general terms the volume of Chrysler traffic which Commercial might expect to receive during shipment of Chrysler's 1958 models. Commercial was disappointed in this indicated volume of traffic and attempted by letter, apparently unsuccessfully, to persuade Chrysler to increase its proposed allocation of traffic to Commercial (R. 111a).

Between June 27, 1957 and July 8, 1957 Crawford, Dixie Transport Company, Inc. (hereinafter called "Dixie") and several other "non-retained" common carriers by motor vehicle with Interstate Commerce Commission rights into the southeastern part of the United States held numerous discussions and meetings at which they generally agreed to form a new corporation under the name of Southern Transport, Inc., (hereinafter called "Southern") and to sell to it their respective operating rights and to make available to it their operating equipment in the hope that such new corporation, having broad Interstate Commerce Commission rights, would be tendered traffic by Chrysler. On or about July 8, 1957, Chrysler notified the participants in the proposed new corporation that if Southern should be incorporated as proposed and receive temporary authority from the Interstate Commerce Commission to operate as a common carrier

before the commencement of shipment of Chrysler's 1958 models, Chrysler would consider tendering traffic to it as a "retained" carrier (R. 113-114a; 533-541a).

On July 17, 1957, Chrysler held a meeting in Detroit, Michigan, with representatives of the "retained" carriers to announce its traffic policies for the 1958 model vehicle shipments. Representatives of the proposed Southern, including Mr. Sam Crawford, Vice President of petitioner Crawford, were invited and attended the meeting. At the meeting Chrysler again announced, as it had at the meeting on May 17, 1957, that it would no longer honor dealer requests as to carrier selection and that henceforth the "retained" carriers would be expected to solicit Chrysler business from Chrysler alone and to cease soliciting such business through solicitation of Chrysler dealers. It distributed to the representatives present, maps of the country showing the areas thereof into which, commencing with the shipment of its 1958 models, Chrysler planned to tender traffic to particular carriers, including Southern, based on each carrier's destination territories as fixed by the Interstate Commerce Commission. In announcing its proposed allocation of traffic to individual carriers, Chrysler emphasized that these were intended only as indications of Chrysler's present intent and that Chrysler would from time to time make such changes in its traffic policies as it might deem appropriate. During the meeting Chrysler expressed the hope and expectation that the "retained" carriers would not increase their rates, would use Dodge trucks in the transporting of Chrysler made vehicles and would not enter into interchange agreements relating to Chrysler traffic with

carriers who were not "retained" carriers without Chrysler's written approval (R. 114-115a; 336-351a).

Chrysler notified Commercial at the July 17 meeting that, among other traffic, Chrysler intended to tender to Commercial all of its traffic to the state of Kentucky commencing with the shipment of its 1958 models. In 1957 and in prior model years, Chrysler had tendered to Crawford a portion of its traffic into eastern Kentucky but had given to Commercial virtually all its traffic into western Kentucky, since Commercial was the only common carrier with direct line authority into such area from Detroit (R. 115a). Although temporary approval had been granted by the Interstate Commerce Commission for Commercial's acquisition by merger of the direct line operating rights of Auto Express, Inc., into the state of Florida, Chrysler announced that all of its direct line traffic into that state during the model year 1958 would be tendered to Southern and that Commercial would not participate in such traffic (R. 115a).

Southern was organized in August, 1957. In the beginning of October, 1957, the Interstate Commerce Commission granted to Southern temporary operating authority into certain states in the southeastern part of the United States. Thereupon Chrysler tendered traffic to Southern for shipment of its 1958 model vehicles to destination points in the states of Florida, Georgia, North Carolina and South Carolina and continued to do so for that entire model year (R. 116-117a).

In exchange for the operating rights it transferred to Southern, petitioner Crawford received a 19% in-

terest in all the outstanding voting stock of Southern. Southern leased from Crawford and the other participating carriers their operating equipment under terms of payment approved by the Interstate Commerce Commission, and Southern used Crawford's equipment to transport in interstate commerce Chrysler's 1958 model vehicles in accordance with an agreement under which the stockholders of Southern allocated among themselves the traffic that Chrysler tendered to Southern.

After Chrysler's new traffic program was put into effect Chrysler continued to tender traffic directly to 4 of Crawford's 9 competitors (R. 136-137a; 533-541a). Three other competitors together with Crawford, though "non-retained" carriers, continued to participate in Chrysler traffic as a part of Southern Transport (R. 334-336a).

In August of 1958, at the end of Chrysler's 1958 model year, Southern went out of business (R. 117a).

Thereafter Crawford commenced this action against respondents.

ARGUMENT

In arguing that the decision of the Court of Appeals, which petitioner here asks this Court to review, contravenes *International Salt Co.* v. *United States,* 332 U.S. 392 (1947) and *Northern Pacific Ry.* v. *United States,* 356 U.S. 1 (1958), petitioner attempts to distort the *ratio decidendi* of the opinions in those cases and to make their principles applicable to every

arrangement under which separately saleable items are sold only in combination. This is to confuse the symptoms with the disease.

The perniciousness of the "tying" arrangements that this Court has condemned as *per se* violations of the Sherman Act lies not in the fact that two separate items are being sold together but, rather, in the seller's extending into a separate area of competition a competitive advantage gained in another and different line of commerce. In other words a tying arrangement becomes an unreasonable restraint of trade when it enables the seller to compete in the trade of the "tied" item on an advantageous basis as a result of his dominance in the "tying" item's market rather than because of free competitive forces in the "tied" item's market. In short, a tying arrangement of the type judicially condemned necessarily involves a seller who engages for profit in the business or market to which the "tied" item, as such, belongs.

Thus, in *Northern Pacific Ry.* v. *United States, supra,* the seller of the "tying" item, land, was primarily in the business of selling the "tied" item, transportation services. So also in *International Salt Co.* v. *United States, supra,* [salt tied to machines]; *United States* v. *Jerrold Electronics Corporation,* 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961) [service contracts tied to television equipment]; *Osborn v. Sinclair Refining Co.,* 286 F. 2d 832 (4th Cir. 1960) *cert. denied,* 366 U.S. 963 (1961) [auto accessories tied to lease of premises]; *United States* v. *General Motors Corp.,* 121 F. 2d 376 (7th Cir.), *cert. denied,* 314 U.S. 618 (1941) [financing services tied to automobiles], the seller, in each case,

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IN THE

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OCTOBER TERM, 1964

No. 888

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v.

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and

COMMERCIAL CARRIERS, INCORPORATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT COMMERCIAL CARRIERS, INCORPORATED

This brief is filed by respondent Commercial Carriers, Incorporated ("Commercial") in opposition to the petition of Crawford Transport Company, Incorporated ("Crawford") for a writ of certiorari. The other respondent herein is Chrysler Corporation ("Chrysler"). The petition seeks review by this Court of a decision of the United

States Court of Appeals for the Sixth Circuit, reported in 338 F.2d 934, which unanimously affirmed the judgment of the United States District Court for the Eastern District of Kentucky (per Swinford, J.) dismissing, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, the complaint of Crawford against Chrysler and Commercial upon completion of Crawford's presentation of its evidence.

Questions Presented

Two questions are presented by the petition herein. Only one involves respondent Commercial. This question, as stated in the brief for Chrysler (Question 2 under the heading "Questions Presented", Brief for Respondent Chrysler), which statement we believe to be more precise than the statement thereof in the petition (Question 2 under the heading "Questions Presented", Petition, pp. 2-3), is as follows:

> Whether the Court of Appeals erred in holding that the evidence supported the trial judge's findings that the respondents did not attempt to monopolize or combine or conspire to monopolize or to restrain the trade of transporting new automobiles in violation of Sections 1 or 2 of the Sherman Act.

The other question presented, referred to by petitioner as the "principal question presented" (Petition, page 4), relates to plaintiff's charge that Chrysler violated Section 1 of the Sherman Act (15 U.S.C. §1) in that it "tied" the sale of transportation to the sale of its motor vehicles. Commercial is not involved in this aspect of the case and this brief will not attempt to deal with the issue raised thereby. Commercial, however, respectfully submits that

this issue was properly decided by the courts below and subscribes to the arguments in respect thereto presented in the brief for respondent Chrysler.

Statement

The facts herein are correctly stated in the brief for respondent Chrysler under the heading "Statement."

Reasons for Not Granting This Writ

Respondent Commercial submits that the writ sought by the petition, insofar as it relates to the only question in which Commercial is involved, should not be granted for the following reasons:

1. The petition seeks a review by this Court of findings of fact made by the trial court and unanimously affirmed by the Court of Appeals.

Insofar as this petition involves respondent Commercial, it seeks a review of the unanimous affirmance by the Court of Appeals of the factual determinations by the trial court that Chrysler's decision to exercise the right to select the carriers who would haul its motor vehicles to its dealers, to reduce the number of carriers to whom it would tender shipments of such vehicles, and to discontinue tendering such shipments to Crawford were unilateral decisions made by it for the sole purpose of obtaining a more efficient and economical distribution of its products and were not made as a part of or pursuant to any unlawful contract, combination, agreement, understanding or conspiracy with respondent Commercial. These determinations are embodied in Findings of Fact 7, 8, 12, 13, 18, 24,

25, 32, 33, 41 and 42 (Appendix B to the Petition, pages 50 *et seq.*).

These findings of fact were made by the trial court, to whom the action was tried without a jury, upon conclusion of Crawford's case as plaintiff. The trial had been preceded by extensive documentary discovery of Commercial and of Chrysler and exhaustive depositions of the officers and employees of Chrysler and of Mr. Ray Van Beckum, the president of Commercial during the period covered by the complaint. The presentation of the case extended over several weeks. The motion to dismiss by Chrysler and Commercial was exhaustively briefed and argued by the parties and the findings of fact were made by the trial court after submission of proposed findings of fact by the opposing parties referenced to the record.

These findings of fact were reviewed by the Court of Appeals, which unanimously concluded that:

> "The evidence supports these findings of fact. Neither the findings of basic facts nor the inferences drawn therefrom are clearly erroneous." (Appendix B to the Petition, p. 39)

This Court has stated that it cannot undertake to review "concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275. Petitioner has not made any such showing with respect to the findings of fact involving Commercial (see point 3, pp. 6-11, *infra*) and certiorari should not be granted with respect to them.

2. There is no conflict between the decision below and the decision of the Second Circuit in *Miller* v. *Commissioner*, 327 F.2d 846 (2d Cir. 1964).

Petitioner, in an attempt to find some basis for review by this Court, suggests that the decision of the court below conflicts with the decision of the Second Circuit in *Miller* v. *Commissioner*, 327 F.2d 846 (2d Cir. 1964), with respect to the test to be applied by a Court of Appeals in reviewing findings of fact made by the trial judge in a case tried to the court without a jury. Consideration of the two decisions in light of their facts shows that there is no real conflict between them.

The court below, citing *Commissioner* v. *Duberstein*, 363 U. S. 278, and *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 stated that it was "bound to accept the factual inferences drawn by a trial judge from undisputed basic facts, unless they are clearly erroneous" (Appendix B to Petition, p. 39). The position taken by the Second Circuit in *Miller* is not in conflict with this statement. In *Miller*, the Second Circuit was reviewing a decision of the Tax Court and the specific issue before it was whether specific transfers were gifts within the meaning of the Internal Revenue Code. The Second Circuit there held that because the "case below was tried on facts which were entirely stipulated, and the lower court's conclusions were based entirely on documentary evidence", it was properly entitled to exercise a scope of review broader than the "clearly erroneous" test. The holding of the Second Circuit is clearly limited to the unusual circumstances of that case. Those circumstances were not present in the instant case. The parties in this action did not stipulate the facts nor were the trial court's conclusions based entirely on documentary evidence.

The *Miller* decision is further distinguishable from the instant case in that it involved a comparatively simple fact situation. In the instant case, as in most cases involving charges of antitrust violations, there is a complex factual situation covering a wide time period. The ultimate facts must be derived from a complicated structure of basic facts established by or inferred from a large mass of testimony and documents. An appellate court, in such a case, cannot be expected to obtain the intimate familiarity of the trial court with the details and nuances of the evidence and necessarily must accord heavy weight to its determinations founded on this familiarity. *Cf. United States* v. *Oregon State Medical Society*, 343 U. S. 326.

Commercial submits that the court below applied the proper test in reviewing the findings of fact of the trial court and that the decision of the Second Circuit in *Miller* does not suggest that a different test should have been applied.*

3. Petitioner has not made "a very obvious and exceptional showing of error" in the findings of fact made by the trial court and affirmed by the Court of Appeals.

The half-hearted attempt of petitioner to establish that the findings of fact of the trial court which relate to or involve Commercial were "clearly erroneous" (Petition, pp. 20-23) is without substance; certainly petitioner has failed to make "a very obvious and exceptional showing of error" on the part of the courts below with respect to such findings.

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* It should also be noted that petitioner does not suggest, nor does the decision below in any way suggest, that the court below would have reached a different result if a more stringent test had been applied.

Petitioner's argument that a conspiracy existed between Chrysler and its subsidiary, Chrysler Motors Corporation with respect to Chrysler's adoption of its Carrier Retention Program (Petition, pages 20-21), is of course, irrelevant to the issue of whether Commercial was a participant in any conspiracy or combination with Chrysler.

Petitioner contends that Commercial "participated in the combination in proceeding with absorption of assets of non-retained carriers" and that such participation was an act "knowingly performed • • • to promote or aid in the attainment" of a known conspiracy (Petition, pages 21-22). The record shows that the only acquisition made by Commercial of a non-retained carrier or of the assets of such a carrier was its acquisition of the stock of Auto Express, Inc. There is no evidence that Commercial ever negotiated for or even considered any other such acquisition. With respect to the acquisition of Auto Express, Inc. it is sufficient merely to quote the findings of fact of the trial court with respect to such acquisition, findings which plaintiff cannot and does not attempt to refute. The trial court found as follows:

> "37. In the summer of 1957, Commercial acquired all of the stock of Auto Express, Inc., a small carrier which held direct line operating rights from Detroit, Michigan, to the State of Florida. Auto Express, Inc. was a 'non-retained' carrier. Commercial, which did not have such direct line authority from Detroit, Michigan, to Florida, had begun negotiations for the purchase of Auto Express, Inc. in 1954 after representatives of the Cadillac Division of General Motors Corporation had suggested that Commercial obtain direct line authority to Florida. In the fall of 1956, repre-

> sentatives of Chrysler also suggested that Commercial, which had been hauling Chrysler vehicles to Florida by a combined truck-barge-truck route, 'round out' its authority by obtaining direct line rights to that state through the purchase of Auto Express, Inc. The evidence indicates that the price paid by Commercial for the stock of Auto Express, Inc. was fair and the acquisition and subsequent merger of Auto Express, Inc. into Commercial was approved by the Interstate Commerce Commission." (Appendix B to Petition, pp. 61-62)
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> • • •
>
> "Although temporary approval had been granted by the Interstate Commerce Commission for Commercial's acquisition by merger of the direct line operating rights of Auto Express, Inc. into the state of Florida, Chrysler announced that all of its direct line traffic into that state during the model year 1958 would be tendered to Southern [the carrier formed by Crawford and certain other non-retained carriers] and that Commercial would not participate in such traffic." (Finding of Fact 39, Appendix B to Petition, p. 63)

Petitioner's further contends that Commercial, in furtherance of the alleged conspiracy, adhered to the "policies of Chrysler prohibiting these retained carriers from dealing with non-retained carriers in leasing (interchange and interline) arrangements" (Petition, pages 21-22). The record is simply barren of evidence to support this contention.

Two record citations are given by petitioner in support of the contention, R. 348-349a and 383-384a. The first consists of a reference to a slide exhibited at the meeting of retention carriers called by Chrysler on July 17, 1957 in which Chrysler representatives expressed the wish that the retained carriers abstain from leasing and interline arrangements with non-retained carriers. It need hardly be said that proof of Chrysler's wish is not proof of

Commercial's act. The second is a reference to testimony by an employee of Chrysler that as far as he knew the retained carriers had not entered into such arrangements. This testimony has little weight in view of Crawford's failure, despite extensive pretrial discovery of Commercial, to show from the books and records of Commercial what Commercial's practice had been with respect to such arrangements either before or after adoption by Chrysler of its Carrier Retention Program. These books and records could have definitively established what Commercial actually did. They were available to Crawford. They were not sought or produced at trial by Crawford. Moreover, there was no testimony at trial by any representative of Crawford or any other non-retained carrier that they had solicited or inquired as to the possibility of entering into such arrangements with Commercial or any other retained carrier and had been refused.

In these circumstances, we submit that the following findings of fact by the trial court on this issue were supported by the evidence:

> "40. There is no evidence that Chrysler solicited an agreement from any of the 'retained' carriers to hold the line on rates, to use Dodge trucks or to refrain from interlining or entering into leasing arrangements with 'non-retained' carriers or with Crawford or threaten to or imposed any sanctions for non-compliance with its announced policy.
>
> "41. There is no evidence that Commercial or any other 'retained' carrier entered into any contract, combination, agreement, understanding or conspiracy with Chrysler to hold the line on rates, to use Dodge trucks or to refrain from interlining or entering into leasing arrangements with 'non-retained' carriers or with Crawford." (Appendix B to Petition, page 63.)

Petitioner also makes the general allegation that the "respondents' intention" was to "eliminate competition in the business of transporting new vehicles from Detroit and to eliminate non-retention carriers as competitors in such business through absorption of their assets by selected carriers" (Petition, pp. 22-23). This allegation is similarly without foundation in the record.

The record clearly demonstrates that Chrysler's intention was to exercise its right as a single trader to select the carriers to whom it would tender its traffic during the 1958 model year in an effort to obtain better transportation service at a reduced cost. It in no way obligated itself to anyone to continue to deal with the carriers selected even through the model year 1958 and expressly reserved the right to reallocate its traffic at any time (R. 338a-339a). Petitioner does not allege, nor is there any evidence in the record whatsoever to indicate that there was any understanding, or agreement, or even discussion, among the retained carriers as to allocation among themselves of Chrysler's traffic. On the contrary, the record is clear that Chrysler alone determined such allocation and the trial court so found (Finding of Fact 31, Appendix B to Petition, page 59).

Beyond this, the two reports of Chrysler personnel which petitioner cites in support of its allegation (R. 508-521a, R. 445-507a) speak for themselves. We submit they establish that Chrysler adopted its Carrier Retention Program in an attempt to emulate what it considered to be the more efficient traffic policies of its two principal competitors, Ford Motor Company and General Motors Corporation, and that the interest of Chrysler in possible acquisitions of assets of non-retained carriers by retained carriers was a legitimate one and one which, in large part, was motivated by a desire to minimize hardship to the owners and employees of non-retained carriers.

In any event, whatever the intentions of Chrysler might have been, there is no evidence of any agreement on the part of Commercial not to compete for any traffic which it could lawfully carry under its certificated operating authority or, as discussed above, to participate in any program of absorption of non-retained carriers.*

There is no evidence in the record that Commercial ceased competing for Chrysler's traffic. This competition, which prior to adoption of the Carrier Retention Program included solicitation of Chrysler and of the dealers, continued after adoption of the program by solicitation of Chrysler. Indeed, the letter to Chrysler from the president of Commercial of July 2, 1957, which is referred to in the petition (page 23) as evidence of some conspiratorial understanding between Commercial and Chrysler, clearly evidences Commercial's continued attempts after announcement of the Carrier Retention Program to solicit additional traffic from Chrysler.**

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* In this connection, it should be noted that Commercial and all of the other carriers involved were common carriers certificated by the Interstate Commerce Commission. Each carrier had authority to transport motor vehicles from specified origin points to specified destination points. The carriers competed with one another only to the extent their operating authorities overlapped and in some instances only one carrier had operating authority for a given route. Purchase or sale of the assets of any of the carriers was also subject to approval by the Commission.

** Petitioner at trial placed great weight on this letter and it is specifically discussed in Finding of Fact 30 (Appendix B to Petition, page 59). The trial court concluded:

> "This letter, and the other discussions between Commercial and Chrysler as to which any evidence was introduced, constituted nothing more than attempts by a single carrier, acting unilaterally, to compete with other carriers with duplicating operating rights by solicitation of additional business from a shipper."

4. The petition insofar as it relates to plaintiff's charges of combination or conspiracy does not present a "unique and important question of Federal antitrust law."

The petition, insofar as it relates to Commercial, does not present a "unique and important question of Federal antitrust law", as alleged by petitioner (Petition, page 23). On the contrary, disposition of petitioner's charges of a combination or conspiracy among Chrysler, Commercial and other retained carriers involves nothing more than a simple application of the fundamental principle that a trader engaged in a private business has the right freely to exercise his own independent discretion as to the parties with whom he will deal. *United States* v. *Colgate & Co.*, 250 U. S. 300, 307; *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207, 212.

Petitioner's appeal to decisions such as *United States* v. *Parke, Davis and Company*, 362 U. S. 29 and *Silver* v. *New York Stock Exchange*, 373 U. S. 341, which hold that *concerted* refusals to deal by a group of persons can be violative of the antitrust laws, is inapposite. The trial court here found that Chrysler's refusal to deal with non-retained carriers was a unilateral decision and that there was no evidence that Commercial or any other retained carrier entered into any contract, combination, agreement, understanding or conspiracy with Chrysler not to deal with non-retained carriers (Findings of Fact, 40 and 41, Appendix B to Petition, p. 63). As shown above, petitioner has failed to show that such finding of fact was clearly erroneous.

Petitioner's basic complaint in this action is that Chrysler gave its transportation business to Commercial and to the other retained carriers and not to plaintiff. The principle it espouses seems to be "once serve, always serve." The courts have never interceded merely because

"one competitor succeeded and necessarily the other failed". *Parmelee Transportation Co.* v. *Keeshin*, 292 F. 2d 794, 804 (7th Cir. 1961).

The basic principles of law established by the cases cited above have been repeatedly applied in cases involving fact situations analogous to the one in this action. *Schwing Motor Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.), *aff'd per curiam*, 239 F. 2d 176 (4th Cir. 1956), *cert. denied*, 355 U. S. 823 (1957); *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), *cert. denied*, 355 U. S. 822 (1957); *Hudson Sales Corp.* v. *Waldrip*, 211 F. 2d 268 (5th Cir.), *cert. denied*, 348 U. S. 821 (1954); *Interborough News Co.* v. *Curtis Publishing Co.*, 225 F. 2d 289 (2d Cir. 1955). No significant issue of law is raised in this case by petitioner's allegations of combination or conspiracy which have not been settled in these decisions.

CONCLUSION

The petition, at least insofar as it seeks review with respect to Question 2 in the statement of questions presented contained therein, presents no issue appropriate for consideration by this Court and should be denied.

Respectfully submitted,

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was competing in and attempting to make a profit from the business of selling the "tied" item as such.

The decision in *Goodyear Tire and Rubber Co.* v. *Federal Trade Commission*, 331 F. 2d 394 (7th Cir. 1964), *cert. granted*, December 14, 1964, to the extent, if any, that it involves the selling of gasoline only on condition that the purchaser buy a certain brand of auto accessories from which the seller receives a commission, is not materially different from *Osborn* v. *Sinclair Refining Co., supra.*

On the other hand, when the seller clearly is not engaging in the business of selling the "tied" item as such, insists on combining with the sale of his product or service the sale of an interrelated product or service in order to improve his competitive position in the "tying" item's market, and seeks no profit from the sale of the "tied" item (except insofar as it improves his competitive position in the "tying" item's market), free competition in the "tied" item's market is not adversely affected and the "tying" of two separately saleable items does not constitute a *per se* violation of the Sherman Act.

The cases of *Nelligan* v. *Ford Motor Co.*, 262 F. 2d 556 (4th Cir. 1959), and *Miller Motors, Inc.* v. *Ford Motor Co.*, 252 F. 2d 441 (4th Cir. 1958) illustrate this principle. In each of these cases Ford was charged with violating Section 1 of the Sherman Act by "tying" to the sale of its Lincoln and Mercury motor vehicles a requirement that the purchasing dealer pay a certain amount of monies into a cooperative advertising fund known as the Lincoln-Mercury Dealer Advertising Fund. In both cases the

Court of Appeals for the Fourth Circuit rejected the contention, pointing out in the *Miller Motors* case, *supra,* at p. 446:

> "It is not shown that Ford had any interest in the Kenyon and Eckhardt advertising agency except to obtain effective advertising service from it. Ford was not using its economic position as an automobile manufacturer to invade and dominate the advertising business."

and in the *Nelligan* case, *supra,* at p. 558:

> "Like Miller, this case is distinguishable from the GMAC case, United States v. General Motors Corp., 7 Cir., 121 F.2d 376, . . . (3) GMAC was selling financing and was in active competition with, other finance companies. Neither Ford nor LMDA is selling advertising; both of them are buying advertising. It is not alleged that Ford had any interest in the advertising agency used by LMDA except to obtain effective advertising service from it. All agencies and all media had a right to compete for the advertising purchased by LMDA."

In the instant case although petitioner's evidence and Chrysler's admissions show that Chrysler required its dealers to purchase new vehicles under terms of sale that permitted Chrysler to arrange and prepay and to separately charge the dealer for all transportation services connected with delivering the vehicle to the dealer. there is no evidence whatsoever that Chrysler *competed* in the business of furnishing transportation services or sought to make a profit, by a commission or otherwise, from the furnishing

of such services by the carriers whom it selected and paid. As the Court of Appeals noted in its opinion (Pet. p. 36):

> "Considering now the facts of the case before us, Chrysler owned no transportation companies and had no financial interest in any of the transportation carriers to which it tendered traffic for its 1958 and subsequent models. It did not seek to invade and dominate the automobile transportation carriers' business. True, Chrysler benefited financially to the extent that it saved millions of dollars in the cost of transportation but it received no direct profits from the transportation carriers. Chrysler made no permanent commitments to any of the carriers which it selected to transport its 1958 model vehicles. As was announced at the meeting of July 17, 1957, it would, from time to time, make such changes in its traffic policies as it deemed appropriate."

Further, the record clearly shows that all of Chrysler's actions of which petitioner complains, including its insistence on arranging for the transportation of the vehicles it sold to retail dealers throughout the country, had as their primary purpose achieving a more timely and economical delivery of its vehicles to the dealers and their customers and thereby improving Chrysler's competitive position in the business of selling *new motor vehicles*,—not transportation services. Thus, the Outbound Transportation proposal that Chrysler's Administrative Committee adopted in January, 1957 had as its express purpose (R. 530a):

> "INSURE THE TIMELY, ECONOMICAL DELIVERY OF THE VEHICULAR PRODUCTS OF THIS CORPORATION TO THE DEALER AND CUSTOMER THRU THE EFFICIENT EMPLOYMENT OF TRANSPORTATION FACILITIES."

There is not one word in that adopted proposal to support a claim that Chrysler wished or intended to compete in the business of furnishing the transportation services that the sales of its vehicles to dealers throughout the country necessarily entailed. Chrysler's sole concern was to enhance its position as a seller of motor vehicles, the product that petitioner claims is the "tying" product in this case.

Chrysler's concern in this respect points up the fact that transportation, although itself a separate trade or line of commerce, is so necessary and important an element in the business of selling new automobiles on a national basis as to be an integral part of that business. In such circumstances an automobile manufacturer's insistence on selling in a single package both the new motor vehicles and the transportation service necessary to deliver those vehicles from the factory to the dealer's place of business is no more an illegal "tie in" sale than is the milk dealer's insistence on selling his product only with the container in which he packages it. As the case of *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F. 2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961) interestingly illustrates, there is no unreasonable restraint of trade when, for valid reasons relating solely to the commerce of the claimed "tying" product, a seller refuses to sell the "tying" product separate from another and different product. In that case the defendant, a manufacturer both of silos

and of a patented unloading device, refused to sell its unloader except for installation in one of its glass-lined silos. It adopted this sales policy because over a period of years it had found its customers frequently attempted to use its unloaders in types of containers in which the unloaders were not designed to function. As a result, defendant through no fault of its own had accumulated a large percentage of dissatisfied customers. In rejecting the plaintiff's contention that A. O. Smith's limitation on the sales of its unloaders was an illegal tying arrangement, the Court of Appeals for the First Circuit pointed out, *supra* at p. 655:

> "We may agree with the plaintiff that the compulsory joining of two 'separate' articles is a per se violation of the act. This statement, however, solves nothing. Articles, though physically distinct, may be related through circumstances. The sound business interests of the seller or, phrasing it another way, a substantial hardship apart from the loss of the tie-in sale may be such a circumstance. It would not be thought, for example, that a one-legged man could insist on purchasing only a left shoe. Whatever may be meant by per se, we must first consider what may be fairly treated by a seller as inseparable. See, in general, Turner, The Validity of Tying Arrangements under the Antitrust Laws, 72 Harv.L. Rev. 50, 68-72 (1958)."

The same rationale can and should apply when, as here, a manufacturer, in order to assure a more timely and economical delivery of its products to more than 6,000 dealers throughout the country, centrally arranges for and exercises a purchaser's con-

trol over all the outbound transportation services necessary to market its products effectively. In such circumstances sound and sensible business considerations justify treating the transportation services necessary to carry out the sales of motor vehicles as an integral part of the product sold. In this respect transportation is as much a part of a nationally distributed automobile as are its separately manufactured and separately saleable tires.

For all the foregoing reasons the decision of the Court of Appeals here sought to be reviewed is in no way contrary to the decisions of this Court or in conflict with the decisions of the Courts of Appeal for other circuits relating to the validity of tying arrangements under the anti-trust laws.

With respect to the second question presented by the petition, respondent Chrysler adopts the brief in opposition filed herein on behalf of respondent, Commercial Carriers, Incorporated.

Conclusion

The petition presents no issue appropriate for consideration by this Court and should be denied.

Respectfully submitted,

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